UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THERESA REEL,

Plaintiff,

v. 09 Civ. 7322 (PGG)

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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New York, N.Y.
May 3, 2012
11:15 a.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

CARY KANE
Attorney for Plaintiff
BY: JOSHUA PARKHURST

MICHAEL A. CARDOZO, Corporation Counsel
for the City of New York
Attorney for Defendant
BY: LAWRENCE PROFETA

(Case called)

THE COURT: As you both know, pending before me has been defendant's motion for summary judgment, and I am going to read my decision into the record. It is going to take some time. I apologize for that. But I am interested in moving the case forward as quickly as possible and it's more efficient for me to issue the ruling from the bench than to take the time to enter a written opinion, so that's why I'm proceeding the way I am.

Plaintiff Theresa Reel alleges that defendant New York City Department of Education discriminated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 et seq., Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 et seq., The New York State Human Rights Law, New York Executive Law Section 296, and the New York City Human Rights Law, New York City Administrative Code, Section 8-101 et seq. Plaintiff brings claims for hostile work environment and retaliation.

The Department of Education has moved for summary judgment on all of plaintiff's claims. In seeking summary judgment DOE has submitted a Rule 56.1 statement listing 345 allegedly undisputed material facts. Not surprisingly, plaintiff disputes many of these allegedly undisputed material facts and submits nearly 500 additional allegedly material facts, many of which DOE disputes. In short, this is a

factually intensive case and one in which many facts are in dispute. Because there are material issues of fact, DOE's motion for summary judgment on plaintiff's Title VII and Title IX claims will be denied. Plaintiff failed to submit a proper notice of claim as to her New York State Human Rights Law and New York City Human Rights Law claims, however, and, as a result, DOE is entitled to summary judgment on those claims. Accordingly, DOE's motion for summary judgment will be granted in part and denied in part.

Plaintiff has worked as a high school teacher at the School for Legal Studies in Brooklyn, New York since September of 2005, citing defendant's Rule 56.1 statement, paragraph 1. I will refer to the school throughout this opinion as SLS. Plaintiff has offered evidence that throughout her tenure at SLS, numerous students have made derogatory and degrading remarks of a sexual nature to her on a regular basis. For example, there is evidence that on at least 14 occasions between June 2007 and September 2010, students yelled "suck my dick" or "Ms. Reel sucks dick" at her, citing defendant's Rule 56.1 statement at paragraphs 85, 91, 182, 196, 227, 245, 247, 250, and 342-343. Also, the Parkhurst declaration, Exhibit 4, and plaintiff's Rule 56.1 response at paragraphs 492, 575, 607, and 611. There is evidence in the record that on numerous occasions students speaking to Ms. Reel made reference to her genitals and other body parts. Id. paragraphs 48-49, 53-55,

77-79, 117, 232; plaintiff's Rule 56.1 response, paragraphs 232, 419, and 579.

Ms. Reel has offered evidence that on one occasion a student called her an "ugly bitch" and stated, "I have rubbers, want to party?" Id., paragraph 130. On another occasion, a student told the class that another student who had received a high mark on an assignment must have performed oral sex on Reel in exchange for the grade. Id., paragraph 145. There is also evidence that Reel was subjected to frequent sex-based name calling, including being referred to as a "bitch," a "cunt," a "ball licker," and "cock sucker." Id., paragraphs 33, 61, 72-74, 91, 97, 130, 227, and 238; Parkhurst declaration, Exhibit 4; plaintiff's Rule 56.1 response at paragraph 535. In addition to the misogynistic and sexually-oriented comments by students, there is also evidence that Reel has been subjected to obscene gestures by students, and that on at least one occasion inappropriate sexual contact by a student. Id. paragraph 64-67, 142 and 245.

It is undisputed that Ms. Reel complained repeatedly about this conduct to SLS administrators, including various assistant principals, principals, and deans of the school. See, for example, defendant's Rule 56.1 statement, paragraphs 48, 69, 113, 133-34, 240, 261, 271. DOE asserts that these administrators "acted reasonably and promptly in response to plaintiff's complaints about her students," and that the

"multidisciplinary approach taken by the school to student misconduct, which included removal from the classroom, conferences with a student, his or her parent/guardians, and, in some cases, suspensions, was certainly reasonable," citing defendant's brief at 14 and 16. I conclude, however, that there are material issues of fact as to whether the steps taken by SLS administrators were adequate, particularly with respect to general deterrence, as Ms. Reel has presented evidence that the sexual harassment by students continued unabated.

Ms. Reel has also offered evidence that SLS administrators retaliated against her for engaging in protected activity, which included the filing of internal complaints about sexual harassment by her students, filing charges of discrimination with the EEOC, and commencing this action.

The alleged retaliation includes negative classroom evaluation reports and an unsatisfactory rating for the 2009-2010 school year. DOE argues that Ms. Reel cannot demonstrate causation because "there is no evidence of retaliatory animus," "nor is any alleged retaliatory action close in time to when plaintiff engaged in protected activity," Citing defendant's brief at 20. DOE further contends that even if Ms. Reel could establish a prima facie case of retaliation, she cannot demonstrate pretext.

Ms. Reel filed a charge of discrimination with the EEOC on or about August 1, 2008, and the EEOC issued her a

right to sue letter on May 28, 2009, citing defendant's Rule 56.1 statement, paragraphs 9 through 10. She filed the instant action on August 20, 2009.

With respect to the legal standard for summary judgment, summary judgment is warranted where the moving party shows that "there is no genuine issue as to any material fact" and that it "is entitled to judgment as a matter of law," Citing Federal Rule of Civil Procedure 56(c). "A dispute about a genuine issue exists for summary judgment purposes when the evidence is such that a reasonable jury could decide in the nonmovant's favor," citing Beyer v. County of Nassau, 524 F.3d 160, 163 (2d Cir. 2008). In deciding a summary judgment motion, the Court "resolves all ambiguities and credits all factual inferences that could rationally be drawn in favor of the party opposing summary judgment," citing Cifra v. General Electric Company, 252 F.3d 205, 216 (2d Cir. 2001).

"It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases," and that "the salutary purposes of summary judgment avoiding protracted, expensive, and harassing trials apply no less to discrimination cases than to other areas of litigation," citing Abdu-Brisson v. Delta Airlines, Inc., 239 F.3d 456, 466 (2d Cir. 2001). As in any other case, "an employment discrimination plaintiff faced with a properly supported summary judgment motion must do more than simply show

that there is some metaphysical doubt as to the material facts. She must come forth with evidence sufficient to allow a reasonable jury to find in her favor," citing Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001).

"Mere conclusory statements, conjecture or speculation" by the plaintiff will not defeat a summary judgment motion. Gross v. National Broadcasting Company, Inc., 232 F.Supp.2d 58, 67 (S.D.N.Y. 2002). Instead, the plaintiff must offer "concrete particulars." Bickerstaff v. Vassar College, 196 F.3d 435, 451-52 (2d Cir. 1999).

In the context of a hostile work environment claim, however, "the promptness and adequacy of an employer's response is generally a question of fact for the jury," citing Hussain v. Long Island Railroad Company, 2002 WL 31108195, at *8 (S.D.N.Y. September 20, 2002); Rooney v. Capital District Transportation Authority, 109 F.Supp.2d 86, 95. (N.D.N.Y. 2000) ("The assessment of the employer's response to the inappropriate conduct [causing a hostile work environment] is frequently considered a jury question. Indeed, if the evidence creates an issue of fact as to whether an employer's action is effectively remedial and prompt, summary judgment is inappropriate.")

Similarly, "in cases based on allegations of discriminatory retaliation, courts must use an extra measure of caution in determining whether to grant summary judgment

because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence," citing Thompson v. Morris Heights Health Center, 2012 WL 1145964, at *4 (S.D.N.Y. 2012); see also Ukeje v. New York City Health and Hospital Corporation, 2011 U.S. Dist. LEXIS 127826, at *13 (S.D.N.Y. November 4, 2011) ("When a case turns on the intent of one party, as employment discrimination and retaliation claims often do, a trial court must be cautious about granting summary judgment. Because the employer rarely leaves direct evidence of its discriminatory or retaliatory intent, the Court must carefully comb the available evidence in search of circumstantial evidence to undercut the employer's explanations for its actions"). Batyreva v. New York City Department of Education, 2010 WL 3860401, at *11 (S.D.N.Y. October 1, 2010) ("Due to the highly fact-specific nature of the inquiry, an extra measure of caution is needed in awarding summary judgment to a defendant where, as in a discrimination or retaliation case, intent is at issue.").

In considering plaintiff's claims under Title VII and Title IX, I apply the same analytical framework and standards. See AB v. Rhinebeck Central School District, 224, F.R.D. 144, 153 (S.D.N.Y. 2004).

As to the hostile work environment claim, as a threshold matter, I note that Ms. Reel may sustain a hostile work environment claim against DOE based on the activities of

SLS students and the administration's response to her complaints about those activities. She may prevail on such a claim by showing "first, that a hostile environment existed and, second, that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action," citing Peries v. New York City Board of Education, 2001 U.S. Dist. LEXIS, 23393, at *19 (E.D.N.Y., August 6, 2001); see also Andersen v. Rochester City School District, 2011 WL 1458068, at *4 (W.D.N.Y. April 15, 2011) ("Plaintiff may prevail on her hostile work environment claim for conduct of the [student] and her coworkers if she can demonstrate, one, that a hostile environment existed and, two, that there was no reasonable avenue for complaint or the district knew of the harassment and did nothing about it."); Berger-Rothberg v. City of New York, 803 F.Supp.2d 155 at 164-65 (E.D.N.Y. 2011) (same).

DOE argues that Peries and its progeny were wrongly decided, citing defense brief at 9. While the Second Circuit has not addressed the issue of student-on-teacher harassment, see Das v. Consolidated School District of New Britain, 369, Fed. Appx. 186, 190 (2d Cir. 2010). DOE has cited no case running contrary to Peries. Indeed, courts have uniformly held that liability for hostile work environment may be premised on student-on-teacher harassment. See, e.g., Schroeder v. Hamilton School District, 282 F.3d 946, 951 (7th Cir. 2002)

(explaining that in the Title VII context, school district could be liable to a teacher if they "they knew he was being harassed and failed to take reasonable measures to try to prevent it."); Berger-Rothberg, 803 F.Supp.2d at 164-65; Andersen, 2011 WL 1458068, at *4; Mongelli v. Red Clay Consolidated School District Board of Education, 491 F.Supp.2d, 467, 478 (D. Del. 2007) (holding that "liability for hostile work environment claims under Title VII may attach to schools that fail to address teachers' claim of harassment by students"); Plaza-Torres v. Rey, 376 F.Supp.2d 171, 182 (D.P.R. 2005) ("we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment."). I find the reasoning in Peries and its progeny persuasive and it will be applied here.

"To establish the existence of a hostile work environment in connection with a sexual harassment claim under Title VII, plaintiffs must show (1) that she is a member of a protected group; (2) that she was subjected to unwelcome conduct; (3) that the conduct was based on her sex; and (4) that the conduct was sufficiently severe or pervasive to alter the conditions of her employment," citing Fosen v. The New York Times, 2006 WL 2927611, at *8 (S.D.N.Y. October 11, 2006). Evaluating a hostile work environment claim involves reviewing the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). A single instance of harassment is typically insufficient to establish a hostile work environment, citing Cruz, 202.3d at 570. However, a single incident of harassment may give rise to a hostile work environment claim if that incident is extraordinarily severe. Id.

A plaintiff making a hostile work environment claim must show "not only that she subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive," citing Benn v. City of New York, 2011 WL 839495, at *9 (E.D.N.Y. March 4, 2011). Finally, "the plaintiff must show a specific basis for imputing the conduct creating the hostile work environment to the employer," citing Feingold v. New York, 366 F.3d 138, 150 (2d Cir. 2004).

Here, Ms. Reel has offered sufficient evidence on each element of her hostile work environment claims to permit them to go to a jury. Viewing the evidence in the light most favorable to Ms. Reel, a rational jury could conclude that the student sexual harassment was sufficiently severe and pervasive to create a hostile work environment. As I have discussed, Ms. Reel has offered evidence that she was the victim of ongoing vicious name calling, sexual innuendos, sexual overtures, and,

at least in one case, inappropriate sexual contact. A rational jury could find that these events "were sufficiently continuous and concerted to have altered the conditions of her working environment," citing Peries, 2001 U.S. Dist. LEXIS 23393, at *19. There is evidence that students made vulgar references to Ms. Reel's genitals and other body parts, propositioned her for sex, simulated sex acts in front of her, referred to her using gender-based epithets, and that one student rubbed up against her breast. The offensive conduct about which Ms. Reel complains is similar to conduct that other courts have found sufficient to demonstrate a hostile work environment. See, e.g., Torres v. Pisano, 116 F.3d 625, 632-33 (2d Cir. 1997) ("A reasonable woman would find her working conditions altered and abusive when her supervisor repeatedly referred to her as a dumb cunt, suggested that she was in the habit of performing oral sex for money, ridiculed her pregnancy, commented on her anatomy and his desire to have sex with her, and allowed friends of his who visited him at the office to make crude sexual remarks about her. Plaintiff has therefore established a strong prima facie case of sexual harassment."); Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 61-63 (2d Cir. 1992) (affirming district court's finding that plaintiff has been subjected to a hostile work environment in which plaintiff's supervisor has repeatedly subjected them to vulgar comments and gestures); Dyke v. McCleave, 79 F.Supp.2d 98, 105

(N.D.N.Y. 2000) (finding sufficient evidence of hostile work environment where plaintiff's supervisor "repeatedly used profanity in his communications with plaintiff and, on a daily basis, referred to her and other female employees as cunt, slut, whore, lesbian, dyke, and other similar derogatory names"); Badlam v. Reynolds Metals Company, 46 F.Supp.2d. 187 195 (N.D.N.Y. 1999) (finding sufficient evidence of hostile work environment where plaintiffs offered "evidence that they were repeatedly subjected to sexual innuendo, rude and offensive comments, pornographic materials, and explicit, tasteless drawings and written profanity by their male coworkers. Hollis v. City of Buffalo, 28 F.Supp.2d, 812, 820-21 (W.D.N.Y. 1998) (finding hostile work environment where plaintiff offered evidence that her supervisor "engaged in offensive sexual harassment that included commenting about her breasts, making obscene gestures directed at her, repeatedly using vulgar and offensive language when speaking to her or others in her presence, and leaving inappropriate messages over her work pager."). Although DOE dismisses several of these incidents as "simple teasing or offhand comments," a reasonable fact finder could conclude that many of the incidents went far beyond teasing and constituted severe and pervasive sexual harassment sufficient to have altered Ms. Reel's work environment.

It is likewise clear that Ms. Reel perceived the

environment to be hostile. She repeatedly submitted complaints about the sexual harassment, and she has testified that she sought mental health counseling because she felt suicidal due to "the situation at work," Reel deposition, 31 and 40. Indeed, Ms. Reel states in her declaration that she attempted suicide on May 4, 2011 as a result of the alleged harassment, Reel declaration, paragraph 65.

DOE contends that "there is no evidence that the incidents plaintiff complains about in this lawsuit occurred as a result of her gender. In fact, the evidence is to the contrary," citing defense brief at 2. I disagree. There is evidence that certain harassment was directed only at female teachers. Mary Kate Schweizer, another teacher at SLS, has submitted a declaration stating that the conduct about which Reel complains is "reserved for female teachers, not male teachers," citing Schweizer declaration at paragraph 8. Moreover, many of the terms used to refer to Ms. Reel, such as "bitch," "cunt," "ball licker," and "cock sucker" are usually associated with females. See, e.g, Windsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996) ("The names plaintiff was called, both verbally and in the form of notes, were also sexual in nature. Over the course of her employment, plaintiff was called a "whore," "cunt," and "bitch" on a consistent basis. These sexual epithets have been identified as "intensely degrading to women.") Braunstein v. Barber, 2009 WL

849589, at *6 (S.D.N.Y. March 30, 2009) ("Using the term bitch can be construed as sex-based harassment."); Funk v. F&K Supply, Inc., 43 F.Supp.2d 205, 216-17 (N.D.N.Y. 1999) (finding hostile work environment where plaintiff's supervisor, among other things, called her "cunt" and "bitch" and frequently said to her, "you blow me"). Although courts "must be careful not to make broad generalizations or assumptions based on the mere use of words" that have some gender-based connotation, such as "bitch" and should consider whether words were used "because of plaintiff's gender or for some other reason," citing Petenaude v. Salmon River Central School District, 2005 WL 6152380, at *5 (N.D.N.Y. February 16, 2005), here a rational jury could conclude that the students' repeated use of the word "bitch" and other terms with gender-based connotations to refer to Reel is evidence of gender-based animus and that Reel would not have been subjected to the harassment but for her sex.

"Ultimately, the jury will have to make a decision by looking at all the circumstances surrounding the harassment, including the severity of the abuse, the nature of the humiliation, its interference with Ms. Reel's teaching, and its effect on her psychological well-being," citing Peries, 2001 WL 1328921, at *6.

The Court likewise cannot resolve as a matter of law the second element of Reel's hostile work environment claims, whether DOE either provided no reasonable avenue of complaint

or knew of the harassment and failed to take appropriate remedial action. There is no dispute here that DOE was aware of the harassment. Ms. Reel filed numerous complaints about student sexual harassment. She argues both that DOE failed to provide a reasonable avenue for complaint and that it "has no complaint process for sexual harassment of faculty by students," and that DOE's disciplinary responses "were inconsistent and ineffective," citing the plaintiff's opposition brief at 13 and 15.

Courts have cautioned that "the question of whether school officials took appropriate remedial action is a question of fact, not law. The jury's analysis of this question can include such issues as what disciplinary options are available short of suspension and what constitutes a proper division of disciplinary responsibility between administrators and teachers" citing Peries, 2001 U.S. Dist. LEXIS, 23393, at *21; see also Reed v. A.W. Lawrence & Company, Inc., 95 F.3d 1170, 1181 ("the question of whether an employer has provided a reasonable avenue of complaint is a question for the jury."); Dobrich v. General Dynamics Corp. Electric Boat Division, 106 F.Supp.2d 386, 394 (D. Conn. 2000) ("Although there was evidence that defendant responded to plaintiff's complaints, the critical issue was whether its response was adequate. Plaintiff claims that the pattern of ineffectual action continued throughout the course of her employment. The

promptness and adequacy of an employer's response is generally a question of fact for the jury."

Here, DOE argues that SLS administrators promptly responded to plaintiff's complaints and that "almost without exception plaintiff did not suffer any repeated episodes of sexual harassment by any of the students about whom she complained," citing the defendant's brief at 14-15.

The record contains evidence that certain of Reel's students continued to harass her even after she had complained, however, and even after discipline had allegedly been imposed. For example, on or about February 4, 2008, Ms. Reel submitted a complaint concerning students TP and TH, citing defendant's Rule 56.1 statement at paragraph 152. According to the complaint, TP told the class that an object on Ms. Reel's desk was a "sex toy," Id. TH then loudly whispered "sex toy," and pointed to his spread legs Id. In May 2008, Ms. Reel filed another complaint against TH, who stared and her chest during class, Id. at paragraph 163. Similarly, on October 25, 2005, student SB stated, among other things, that Reel "ain't got a man," Id. at paragraph 40. On or about November 8, 2007, that same student yelled out in class that Reel was a "lesbian," Id. at paragraph 112. On January 17, 2007, Ms. Reel filed a complaint concerning CA, alleging that she had called Ms. Reel "tits" in the hallway, Parkhurst declaration, Exhibit 4. On or about June 13, 2008, Ms. Reel submitted a complaint concerning

the same student, alleging that she yelled "bitch," "fuck you," "pussy bitch," and "suck my dick" at Ms. Reel, Id. On June 24, 2008, Ms. Reel filed a third complaint against CA, alleging that she yelled in public "Ms. Reel sucks dick," Id.

In late April 2009, Ms. Reel submitted a complaint concerning student JC, who allegedly yelled "bitch" at Ms. Reel and told her to "suck him off," defendant's Rule 56.1 statement, paragraph 238. On April 28, 2009, Ms. Reel submitted another complaint concerning JC, alleging that he yelled outside the door to her classroom "Ms. Reel sucks man dick" and grabbed his crotch and simulated masturbation while telling Reel to "suck his dick," Id. at paragraph 245.

In sum, there is evidence that some of the same students repeatedly made sexually-oriented misogynistic comments to Ms. Reel even after she had complained about their conduct and they had allegedly been disciplined.

There is also evidence that often there was no practical mechanism for Ms. Reel and other female teachers to have their complaints about sexual harassment addressed. For example, Ms. Reel testified that Dean Villa-Leffler would "roll her eyes and nothing would get done" when Ms. Reel submitted complaints about student sexual harassment to her, citing Reel deposition at 43. Ms. Reel also testified that Dean Villa-Leffler often asserted that she had contacted a parent about a student's misconduct, but there was no evidence that

she had actually spoken to the parent, Reel deposition at 278.

Ms. Schweizer states in her declaration that "in my experience at the School for Legal Studies, no action is taken against students [for sexual harassment] and the administration has chosen to accept such behavior as standard conduct from students," citing the Schweizer declaration, paragraph 8.

Ms. Reel also testified that although all teachers have classroom phones that they can use to call the Dean's office if a student is engaging in a threatening behavior, citing defendant's Rule 56.1 statement at paragraph 19. When she has used the phone to call the Dean's office, "no one has ever picked up," Reel deposition at 94, plaintiff's Rule 56.1 statement, paragraph 19.

There is also evidence that since Principal Monica Ortiz arrived at SLS, teachers no longer have the ability to send a disruptive student out of the classroom unilaterally, citing Reel deposition at 88-89. According to Ms. Reel, prior to the arrival of Principal Ortiz, teachers could unilaterally send disruptive students to a designated "save" room. While DOE asserts that the save room still exists and is located in the principal's office or the back of the Dean's office, citing defendant's Rule 56.1 statement, paragraph 30, and Ortiz deposition, 35-38, Ms. Kleinfeld testified that SLS does not "have a save room and generally does not have people to staff the save room, so our principal believes that the save room is

in the Dean's office, but the problem with this is that when there is no one in the Dean's office, what do you do with the children who are in save," citing Kleinfeld deposition at 41.

There are also material issues of fact as to whether DOE acted in a timely fashion in responding to Ms. Reel's complaints and whether those complaints were thoroughly investigated. For example, Ms. Reel testified that a lengthy period of time passed between her complaint about an incident in which a student touched her breast and Dean Abreu's investigation of that complaint, citing the Reel deposition at 142-43. Ms. Reel also testified that Dean Abreu discouraged her from pressing the complaint, stating that DOE's "investigators are trained to zero in on our teachers instead of students," Id. at 143. Although Ms. Schweizer submitted a witness statement in connection with the breast-touching incident, she was never questioned by any SLS administrators, Schweizer declaration, paragraphs 4-5. Ms. Schweizer also states in her declaration that although she complained about an incident in which a student hugged her twice after she asked him not to touch her, she was "never contacted by anyone at the School for Legal Studies to investigate the incident. The only response by the school was for Assistant Principal McCoy to bring [the student's] mother by my class when I was teaching to say that she (not her son) was sorry," Schweizer declaration, paragraph 7.

Finally, given Reel's testimony that the vicious name-calling and sexual innuendo never ended, a rational jury could conclude that SLS's actions were plainly ineffective. Courts have held that a failure to take measures to prevent harassment creates a genuine issue of material fact as to whether an employer's response to harassment was reasonable. See Abdullah v. Panko Electric & Maintenance, Inc., 2011 U.S. Dist. LEXIS 29663, at *49 (N.D.N.Y., March 23, 2011) ("Based on management's response, or lack thereof, to instances of harassment of which they were made aware, a genuine issue of material fact exists regarding whether the procedures set up by the employer to prevent further harassment were reasonable and/or whether the remedial actions taken by the employer in response to plaintiff's complaint were reasonable").

Accordingly, DOE's motion for summary judgment on plaintiff's hostile work environment claims under Title VII and Title IX will be denied.

As to retaliation, "Title VII's antiretaliation provision prohibits an employer from discriminating against an employee or job applicant because she has opposed a practice that Title VII forbids or has made a charge, testified, assisted or participated in a Title VII investigation, proceeding or hearing," citing Berger-Rothberg, 803 F.Supp.2d at 165. Courts evaluate Title VII retaliation claims using a three-step burden-shifting analysis. "First, the plaintiff

must establish a prima facie case of retaliation. If the plaintiff succeeds, then a presumption of retaliation arises and the employer must articulate a legitimate, nonretaliatory reason for the action that the plaintiff alleges was retaliatory. If the employer succeeds at the second stage, then the presumption of retaliation dissipates and the plaintiff must show that retaliation was a substantial reason for the complained-of action." Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010).

To establish a prima facie case of retaliation, "a plaintiff must show that (1) she participated in a protected activity; (2) the defendant knew of the activity; (3) an adverse employment action took place; and (4) there exists a causal connection between the protected activity and the adverse employment action." Berger-Rothberg, 803 F.Supp.2d at 165. Plaintiff's burden in this regard has been characterized as "minimal and de minimus," Woodman v. WWOR-TV, 411 F.3d 69, 76,(2d Cir. 2005). The Second Circuit has noted that "there are no bright-line rules with respect to what constitutes an adverse employment action for purposes of a retaliation claim, and, therefore, courts must pore over each case to determine whether the challenged employment action reaches the level of the adverse," Fincher, 604 F.3d at 721. After the Supreme Court's decision in Burlington Northern and Santa Fe Railway Company v. White, 548 U.S. 53, 2006, "a plaintiff must show

that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," Id. at 68. The Supreme Court noted in White that a plaintiff must show nontrivial action: "We speak of material adversity because we believe it is important to separate significant from trivial harms. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience," Id.

A plaintiff may show retaliatory intent with direct evidence "of retaliatory animus directed against plaintiff," or with circumstantial evidence, including evidence that "the protected activity was followed closely by discriminatory treatment" or evidence of "disparate treatment of fellow employees who engaged in similar conduct." Raniola v. Bratton, 243 F.3d 610, 625 (2d Cir. 2001).

Here DOE concedes both that Ms. Reel engaged in protected activity and that it knew of the protected activity, citing defendant's brief at 16. Accordingly, the first and second elements of a prima facie case are present.

With respect to adverse employment action, Ms. Reel points to, among other things, the following: (1) negative classroom evaluations from June 2009, November 2009, January

2010, and June 2010; (2) written and verbal admonishments by SLS administrators; (3) allegedly excessive scrutiny by SLS administrators, including required weekly meetings with Assistant Principal Carla Heckstall and Principal Ortiz, and the requirement that Reel complete additional paperwork concerning lesson plans and complaints about students; and (4) an unsatisfactory rating for the 2009-2010 school year, citing plaintiff's opposition brief 23-25.

Because DOE concedes that Ms. Reel's unsatisfactory rating for the 2009-2010 school year constitutes an adverse employment action, see defendant's brief at 17, defendant's reply brief at 10, I will address only that alleged adverse employment action.

In order to establish a prima facie case of retaliation, Ms. Reel must also offer evidence from which a jury could infer a causal connection between the alleged adverse employment action and her protected activity.

"Plaintiff may establish a causal connection directly through proof of retaliatory animus, or indirectly, through circumstantial evidence that, for example, the adverse action followed close on the heels of the protected activity, or that the employer also took adverse action against other employees who engaged in protected activity. Vo v. Goodwill Industries of Bronx Site, 2009 WL 5179136, at *9 (S.D.N.Y. September 29, 2009) see also Sulehria v. City of New York, 670 F.Supp.2d 288,

307 (S.D.N.Y. 2009).

DOE argues that Reel's unsatisfactory rating for the 2009-2010 school year was issued in June 2010, more than two years after her first complaint in February 2008 to the DOE's Equal Employment Opportunity office, citing defendant's brief at 20. However, that complaint is not the only protected activity Ms. Reel engaged in, and some of the protected activity is sufficiently close in time to the unsatisfactory rating to demonstrate causation for purposes of establishing a prima facie case of retaliation.

The Second Circuit has ruled that internal complaints qualify as activities protected from retaliation by Title VII. See Raniola, 243 F.3d at 625 ("The district court failed to consider evidence of plaintiff's other protected activities. Raniola's 1987 EEOC complaint and May 1995 internal police complaint also qualify as protected activities from retaliation by Title VII.") Here, Reel made numerous internal complaints concerning sexual harassment by students in proximity to her June 2010 unsatisfactory rating. See Johnson v. Nicholson, 2007 WL 1395546, at *7 (E.D.N.Y., May 11, 2007) ("Plaintiff's protected activity was continuous and ongoing for several years. For this reason, defendant's adverse employment actions could have taken place simultaneously to any one of plaintiff's complaints. A reasonable jury could find that the actions were temporally related to these complaints."). For example, on or

about March 19, 2010, approximately nine days before the June 2010 unsatisfactory rating, Ms. Reel submitted a complaint about a student who had left a sexually-charged note on her desk, defendant's Rule 56.1 statement at paragraph 262.

In addition to temporal proximity, Ms. Reel has offered some evidence of retaliatory animus. She testified that Principal Ortiz became upset with her when she reported students' sexual harassment, and that Dean Villa-Leffler rolled her eyes when Ms. Reel submitted complaints about students' misconduct, citing Reel deposition, 40 to 43. In her declaration, Ms. Reel states that she attempted to submit a student complaint to Dean Villa-Leffler about an incident that occurred on or about September 22, 2008, but that the Dean refused to accept her complaint, reel declaration, paragraph 31. Reel also testified that Assistant Principal Heckstall told her "you'd better watch out, she is out to get you," referring to Principal Morgan, citing Reel deposition, 252-53. Ms. Schweizer testified that Dean Villa-Leffler urged her not to report incidents of sexual harassment, telling her not to "make things hot for yourself" and "you don't want to end up in trouble," Schweizer declaration, paragraph 9. Schweizer also states that Dean Villa-Leffler informed her that Principal Ortiz was angry with her because her name came up in connection with this lawsuit and that she advised her to "stay off the radar," Schweizer declaration, paragraph 15.

I find that Ms. Reel has satisfied her minimal burden at the prima facie stage in demonstrating causation.

"Once a plaintiff has made out a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory basis for the alleged retaliatory acts." Johnson, 2007 WL 1395546, at *7. "This burden of production is not very demanding." Id. Here, DOE has offered a legitimate nondiscriminatory basis for the unsatisfactory rating Ms. Reel received for the 2009-2010 school year. DOE asserts that Ms. Reel's job performance was poor during that year and points to contemporaneous documentary evidence in the form of classroom observations in support of its claim. Because DOE has articulated a nondiscriminatory reason for Reel's unsatisfactory rating, it has met its burden of production under the McDonnell-Douglas test.

"Once a defendant has met the burden of articulating a legitimate, nonretaliatory reason for the challenged employment decision, the plaintiff must point to evidence that would be sufficient to permit a rational fact finder to conclude that the employer's explanation is merely a pretext for impermissible retaliation," Johnson, 2007 WL 1395546, at *8. "To do this, plaintiff is obligated to produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not retaliation

for complaints of discrimination was the real reason for the adverse employment action," Id.

"Title VII is violated if a retaliatory motive played a part in the adverse employment actions, even if it was not the sole cause, and if the employer was motivated by retaliatory animus, Title VII is violated, even if there were objectively valid grounds for [the adverse employment action]." Pergament v. Federal Express Corp., 2007 WL 1016993, at *14, (E.D.N.Y. March 30, 2007).

Viewing the evidence in the light most favorable to Reel, as I must, I find that she has produced sufficient evidence from which a reasonable jury could find that DOE's reasons for giving her an unsatisfactory rating for the 2009-2010 school year were based in part on a retaliatory motive. Over the four years that preceded the 2009-2010 school year, Ms. Reel had received only satisfactory ratings, plaintiff's Rule 56.1 response, paragraph 750-52.

Moreover, Ms. Reel consistently received praise from Assistant Principal Heckstall prior to the 2009-2010 school year. Id. paragraph 755-56, 759-60, 762-64, 766. Although "prior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual," Shabat v. Blue Cross Blue Shield of Rochester Area, 925 F.Supp. 977, 988 (W.D.N.Y. 1996), the Second Circuit has recognized that such evidence "may nonetheless work with other submitted proofs,

such as biased remarks, to support a jury verdict of discrimination." Danzer v. Norden Systems, Inc., 151 F.3d 50 at 56-57 (2d Cir. 1998); see also Sklaver v. Casso-Solar Corp., 2004 WL 1381264, at *8 (S.D.N.Y., May 15, 2004) ("When a defendant claims that it took adverse employment action against plaintiff because of poor job performance, evidence of previously good job performance may be used to show that the claimed nondiscriminatory reason is nonpretextual.").

Here, there is more than simply the unsatisfactory rating. A jury could find that (1) SLS administrators greeted Reel's repeated complaints about sexual harassment with hostility and exasperation; (2) an assistant principal warned Reel that the principal was "out to get her"; and (3) Schweizer, who supported Reel's complaints, was allegedly warned by the school's Dean not to report incidents of sexual harassment, and told that doing so would result in her getting into trouble. See Martinez v. New York City Department of Education, 2008 WL at 2220638, at *13 (S.D.N.Y. May 27, 2008) (citing "evidence of retaliation against other employees engaged in protected activities" as one example of the evidence that shows pretext).

There is also evidence that Principal Ortiz failed to follow DOE procedure in giving Reel an unsatisfactory rating for the 2009-2010 school year. The evaluation form includes numerous performance categories at corresponding boxes in which

to indicate whether a teacher's performance is satisfactory or unsatisfactory, Profeta declaration, Exhibit 61. Principal Ortiz did not check off any of the boxes, Id. At her deposition, Ortiz testified that her failure to do so was an "oversight" and that her "secretary forgot to do it," Ortiz deposition at 191-92. Although a "violation of an organization's internal procedures alone is insufficient to create an inference of discrimination, the failure to follow internal procedures can be evidence of pretext." Petrovits v. New York City Transit Authority, 2002 WL 338369, at *8 (S.D.N.Y. March 4, 2002).

Viewing the evidence in the light most favorable to Reel, a reasonable jury could conclude that retaliatory motive played a part in DOE's decision to give Reel an unsatisfactory rating. Accordingly, DOE's motion for summary judgment on Reel's Title VII and Title IX retaliation claims will be denied.

Turning to plaintiff's New York State Human Rights Law and New York City Human Rights Law claims, DOE argues that Reel's state and city law claims must be dismissed because she failed to serve a notice of claim on DOE, as required by New York Education Law Section 3813, citing defense brief at 24-25. Reel counters "that this is incorrect. Plaintiff served her notice of claim dated May 6, 2008. Both the filing and the response to the notice of claim was pleaded in both the

complaint at paragraph 51 and the amended complaint at paragraph 63," citing plaintiff's opposition brief at 30.

The supposed notice of claim to which Reel refers is a letter dated May 6, 2008 from Reel's counsel to Joel Klein, then DOE chancellor, citing Parkhurst declaration, Exhibit 22. The letter states as follows: "To the extent that Section 3813 of the education law applies to any potential claims against DOE, and to the extent prior complaints by Ms. Reel or other faculty would not be considered a notice of claim to DOE, then please consider this letter such a notice of claim," Id. at 2.

Section 3813(1) of the education law provides that no action may be maintained against a school district unless a written verified notice of claim was served on the "governing body" of that school district within three months of the accrual of that claim. "The Court of Appeals has stated that substantial compliance will not satisfy the notice provisions of Section 3813(1). The statutory prerequisite is not satisfied by presentment to any other individual or body, and, moreover, the statute permits no exception, regardless of whether the Board had actual knowledge of the claim or failed to demonstrate actual prejudice." Professional Details Services, Inc. v. Board of Education of City of New York, 104 A.D.2d 336 (1st Dep't 1984) (quoting Parochial v. Board of Education, 60 N.Y.2d, 539, 548-49 (1983)). New York courts have ruled that service of a complaining letter on a

superintendent of the schools does not constitute compliance with the notice of claim requirement. In Spoleta Construction & Development Corp. v. Board of Education, 221 A.D.2d, 927 (4th Dep't 1995), the court noted that "education law, Section 3813(1) requires a claimant to serve the notice of claim on the governing body of the school district. The governing body in this instance is the board of education. And plaintiff's delivery of the letter to the superintendent of the schools does not constitute service upon the board," Id. at 928. See also Jackson v. Board of Education, 194 A.D.2d, 901, 903 (3d Dep't 1993) ("In this case, petitioner served the notice of claim solely on the superintendent, who is not a member of the governing body or the clerk of the governing body of respondent. Accordingly, Supreme Court did not err in concluding that petitioner did not comply with the mandates of Education Law Section 3813(1).")

Because Ms. Reel did not serve a notice of claim on the Board of Education, as required by Section 3813(1), DOE is entitled to summary judgment on her New York State Human Rights Law and New York City Human Rights Law claims.

Accordingly, for the reasons I just stated, DOE's motion for summary judgment will be granted. As to plaintiff's New York State Human Rights Law and New York City Human Rights Law claims, they will otherwise be denied.

I want to discuss a trial date with you. I can offer

you a trial date of July 9.

MR. PARKHURST: This coming July?

THE COURT: Yes.

MR. PARKHURST: Okay. I would love that. The only issue you may recall -- as plaintiff's counsel, I would love that. The only issue you may recall was that while summary judgment papers were being served, we had agreed on a couple of things. One, that Corporation Counsel would have the opportunity to depose Mary Kate Schweizer. The second is we also agreed that expert discovery would occur after the summary judgment motion. I would like to be able to check with my expert and how quickly he could put together a report.

There are a lot of records to review here. Ms. Schweizer, we were able to get a statement from her. I can contact her. I can't say she is in my custody and control. To the extent we can do that as quickly as that, I would love that, as plaintiff's counsel. I am not sure, given the need for expert discovery and the need to depose Ms. Schweizer, that it can quite be done in that time.

THE COURT: Why don't you take a week to reach out to Ms. Schweizer, reach out to your expert.

Mr. Profeta, do you have an expert that you are using?

MR. PROFETA: Your Honor, I hadn't contemplated that, but I'll have to see what plaintiff is up to and then talk to my people.

THE COURT: Mr. Parkhurst, you will make whatever inquiries you deem necessary. You will speak with Mr. Profeta and then send me a letter in a week's time telling me what the situation is and what time will be necessary to complete the discovery that needs to be done; and with that in mind, what counsel thinks is an appropriate trial date.

I will try the case as early as counsel can do it. I'm not going to be an impediment to the case being tried. It's a question of how long counsel need to get the remaining discovery done and then scheduling it for trial.

MR. PARKHURST: Thank you, your Honor.

MR. PROFETA: Thank you, your Honor.

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